No. 12299

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants,

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

ANSWERING BRIEF FOR CROSS-APPELLEES PAUL GAWZNER AND IRENE GAWZNER.

HILL, MORGAN & FARRER and
STANLEY S. BURRILL,
1007 Title Guarantee Building, Los Angeles 13,
Attorneys for Cross-Appellees Paul Gawzner and Irene Gawzner.

Parker & Company, Law Printers, Los Angeles, Phone MA. 6-9171.

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Preliminary Statement.

We respectfully submit that an attempt to follow the myriad arguments made by appellant Lebenbaum in his opening brief would only cause a repetition of the confusing elements that entered into the cause in the Court below. Actually the issues in the case at bar are simple.

Eliminating the side issues and ramifications the basic elements consist of but three points, *i. e.*,

1. DOES NOT THE CONDEMNATION CLAUSE IN THE LEASE REQUIRE THE PAYMENT OF ALL REMAINING FUNDS IN THE CASE AT BAR TO THE OWNERS GAWZNERS AND REQUIRE THE CANCELLATION OF THE LEASE?

   or if the condemnation clause does not control

2. WHERE THE TENANT HAS PAID NO RENTAL DURING THE PERIOD OF TAKING BY THE UNITED STATES, IS NOT THE LANDLORD ENTITLED TO THE REASONABLE RENTAL VALUE FIXED BY THE JUDGMENT IN CONDEMNATION WHERE THE EVIDENCE SHOWS THERE WAS NO BONUS VALUE IN THE LEASE?

3. WAS IT NOT ERROR FOR THE DISTRICT COURT TO DIVIDE THE AWARD UPON SOME RATIO OF THE PROSPECTIVE PROFITS OF THE TENANT AND RENTAL PAYABLE TO THE LANDLORD?

It is with these three primary issues in mind that we respond to appellant Lebenbaum's brief.

ARGUMENT.

I.

That the Condemnation Clause Determines All Issues in the Case and Requires the Payment of the Entire Award to Gawzners and the Cancellation of the Lease Is Practically Conceded by Appellant Lebenbaum in His Brief.

On page 32 of appellant Lebenbaum's brief at the conclusion of the argument on the condemnation clause,* this concession is made.

> "Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term 'other public body' may be used to include the United States or that it is a 'public

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*For the Court's convenience the condemnation clause of the lease is again set forth:

"Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara County, California, and is the owner of a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceedings. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

> body.' We do not dispute that the instant case involves an eminent domain proceeding for 'a public purpose.' "

In view of this concession we submit that the strained argument that the condemnation clause does not apply in the case at bar needs but short answer.

In appellant Lebenbaum's brief in this Court and in the arguments made to the District Court much has been made of the equities involved. It is contended that it would be more equitable to all parties to hold that the plain language of this condemnation clause did not apply to the case at bar, because if the lease was cancelled Lebenbaum would lose his lease and in addition would lose the use of the $20,000 which he had put up at the time of executing the lease for certain improvements to the property [see paragraph Six of the Lease R. 285]. This same alleged inequity would have resulted from a condemnation action that met the terms of the condemnation clause even under the strained construction contended for by Lebenbaum.

The plain language of the lease cannot be ignored nor the lease rewritten by the Court because of claimed inequities in enforcing the contract. This general rule is stated in 12 *Am. Jur.* 749, Contracts, Section 228, where it is said:

> "Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. * * * Courts

cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties."

The decisions are uniform that a condemnation clause in a lease results in the tenant being unable to share in a condemnation award.

United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729;

United States v. Improved Premises, etc., 54 F. Supp. 469;

United States v. Land, 57 F. Supp. 548.

For other cases see opening brief on behalf of appellants Paul Gawzner and Irene Gawzner.

In the brief to this Court counsel for Lebenbaum have for the first time openly contended that all Lebenbaum is obligated to pay Gawzners for the period the United States occupied the property is the sum of $1500 per month, or a total of $34,000 ($1500 x 22-2/3 months), when during the operation of the hotel Lebenbaum was paying an average of $5,000 per month for the use of the same property under the terms of the lease [R. 433 and 434]. Apparently counsel did not realize the inconsistency of the arguments on the equities involved. The lease requires the hotel, cafe and bar to be continuously operated [R. 281]; the rental payable under the lease is based upon the gross receipts from such operations [R. 281 and 282];

the lease is subject to cancellation if a condemnation proceeding reduces the rentable rooms by fifty per cent or precludes the use of the beach [R. 291 and 292]; the within proceedings prevented the use of the beach and eliminated the possibility of renting any of the rooms or selling any food or liquor.

In spite of these facts counsel argue that the condemnation clause should not be applied because it is not equitable to the tenant but contends it is perfectly equitable to the landlord (Gawzners) to eliminate the operation of the hotel, cafe and bar, destroy the basis upon which the rental was fixed in the lease and to permit the tenant (Lebenbaum) to collect from the United States a sum in excess of $100,000 as the stipulated reasonable rental value of the premises under lease for the period of the taking and to pay the owner of those premises the sum of $34,000 for the same period. (The funds remaining after deducting the agreed sum for restoration is the amount of $113,704. If we deduct from that sum the amount of $10,500 found by the Court to be the value of use of the area not covered by the lease [Findings 23 and 24, R. 232] there remains the sum of $103,204 as compensation for the use of the property under lease.)

This contention is made in spite of the fact that the undisputed evidence shows that there was no bonus value in the lease and that Lebenbaum owned no property which was taken by the United States. This argument, if adopted, would permit Lebenbaum to receive a sum of ap-

proximately $70,000 though no property was taken from him and he was subjected to no expenses during the period the United States occupied the property. It would pay to the Gawzners the sum of $34,000 for the use of the hotel, grounds, furniture and equipment worth several hundred thousand dollars and on which Gawzners were required to pay taxes and insurance while the United States was in possession. When it is recalled that the rental under the lease for the *six months prior to the taking was approximately $30,000 and under the contentions advanced by Lebenbaum, Gawzners would receive only $34,000 for 22-2/3 months,* it is apparent that any equities which might be considered by the Court in interpreting the condemnation clause would be on the side of the landlord rather than that of the tenant.

Again we say that a decision such as contended for by Lebenbaum would not only be inequitable to Gawzners but we contend that the mere statement of the argument is its refutation.

We respectfully ask this question. *For what property or property right is Lebenbaum to be paid nearly $70,000?*

The undisputed evidence shows he has paid no rent during the period the United States had possession [R. 422]. The Court so found [Finding 13, R. 226]. No property was taken from Lebenbaum. Gawzners owned all the real property, the buildings, the furniture, fixtures and equipment of the hotel [R. 354]. The undisputed evidence shows the lease had no bonus value [R. 377 and

393]. The law does not authorize payment for loss of business, prospective profits or good will (*United States v. General Motors,* 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390). Is Lebenbaum to receive approximately $70,000 as a result of some legal mesmerism, while Gawzners, who owned the property which was taken by the United States, receives but a third or fourth of the reasonable rental value of the use of the property acquired?

Had Lenbenbaum ever advanced this full argument in the District Court we have no doubt that the decision of the late Honorable Harry A. Hollzer (made on the pretrial hearing, *United States v. 21 Acres of Land,* 61 F. Supp. 268) would have been different.

The contentions made by appellant Lebenbaum are but proof that the condemnation clause of the lease applies and was meant by the parties to apply to a situation such as is presented by the case at bar.

It must be obvious that the condemnation clause of the lease was inserted therein to avoid just such unreasonable contentions on the part of the lessee as are advanced in this case. We respectfully submit that a contention which would give the lessee nearly $70,000 when no property was taken from him and the lessor but $34,000 for the use of the property taken would make a mockery of the law of just compensation and the decisions of the courts.

II.

A. The Contention of Appellant Lebenbaum That He Is Entitled to the Entire Condemnation Award (Except for the Unleased Area) Is Unsound. Lebenbaum Had Paid No Rent During the Period the United States Occupied the Property. The Court, Therefore, Had Jurisdiction to Pay the Reasonable Rental Value to the Landlord (Gawzners) Where the Undisputed Testimony Showed There Was No Bonus Value in the Lease and No Property Was Taken From the Tenant (Lebenbaum).

The appellant Lebenbaum strenuously contended in the court below and is still contending here that except for the area owned by Gawzners and not covered by the lease that Gawzners were not entitled to any portion of the award, were not entitled to appear in the case and that the District Court had no jurisdiction to apportion the award and that the District Court should distribute the entire award (except for the unleased area) to Lebenbaum, and that Lebenbaum and Gawzners should then be relegated to some other court to determine the rent due under the lease.

It is respectfully submitted that such is not the law either under the California Statutes relative to condemnation proceedings or the rules in Federal condemnation cases.

In a condemnation proceeding instituted by the United States in a Federal Court, the Court is required to adopt the forms and method of procedure afforded by the law of the state in which the Court sits.

> *United States v. Miller,* 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336.

*Section 1244 C. C. P.** provides in part as follows:

"The complaint must contain: * * * 2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;"

Section 1246 C. C. P. provides in part as follows:

"All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint."

Section 1246.1 C. C. P. provides in part as follows:

"Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly."

Section 1247 C. C. P. provides in part as follows:

"The court shall have power: * * * 2. To hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor;"

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*References to the Code of Civil Procedure of the State of California are made by the abbreviation of "C. C. P."

In the case at bar the Third Amended Complaint in Condemnation, upon which the main case went to trial, named as defendants Paul Gawzner, Irene Gawzner and Leo Lebenbaum designating Paul Gawzner and Irene Gawzner as presumptive owners of the property [R. 42]. Prior to the commencement of the trial of the main condemnation proceeding counsel for the Government exercised the option pursuant to the provisions of Section 1246.1 C. C. P. to try the case as against all defendants [R. 130]. The Stipulation for Judgment in the main condemnation proceeding which fixed the compensation to be paid by the United States for the taking and for restoration provided in part as follows [R. 51]:

> "That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, * * *"

The Judgment in Condemnation entered pursuant to said stipulation contained the same provisions [R. 58].

Thus it will be seen that by the statutes of California and by the stipulations of the parties the District Court had jurisdiction of the Gawzners as owners of the property, of Lebenbaum as lessee of the property, of the funds deposited in the Registry of the Court in payment of the just compensation for the taking and the restoration, and

jurisdiction to apportion that award among the parties entitled thereto.

That this is the proper procedure in condemnation proceedings has been frequently recognized by the Federal Courts and other authorities.

18 *Am. Jur.* 964, Eminent Domain, Section 321:

> "The term 'owner', when employed in statutes relating to eminent domain to designate the persons who are to be made parties to the proceeding, refers, as is the rule in respect to those entitled to compensation, to all those who have any lawful interest in the property to be condemned."

In *Silberman v. United States,* 131 F. 2d 715, the court states at page 717:

> "Upon condemnation the condemnor is vested with a complete title and all interests in the property taken are extinguished. *A. W. Duckett & Co., Inc., v. United States,* 1924, 266 U. S. 149, 45 S. Ct. 38, 69 L. Ed. 216; *United States v. Dunnington,* 1892, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996. All persons having any interest in the property taken are necessary parties to the condemnation proceedings. See 2 *Lewis, Eminent Domain,* 3rd Ed., 1909, Sec. 515, page 935."

In *United States v. 53.25 Acres of Land,* 47 F. Supp. 887, the court said at page 889:

> "The proceeding for the taking of the above described land having been held before this Court, jurisdiction vests properly in it to make such further orders, judgments or decrees as it may deem necessary."

Probably the most concise statement of the rule appears in the case of *Hopkins v. McClure,* C. C. A. 10th, 148 F. 2d 67, where the court said at page 70:

> "The declaration of taking; the deposit of the estimated just compensation in the registry of the court; the fixing of title (Second War Powers Act, 1942, 56 Stat. 177, 50 U. S. C. A. Appendix, §632, and 40 U. S. C. A. §258a); the determination of just compensation in accordance with state procedure (66 O. S. A. §§53 to 60 inclusive) as directed by Federal law (36 Stat. 1167, 40 U. S. C. A. §258), and the ultimate distribution of the just compensation to those determined to be legally entitled thereto is one continuous integrated process of litigation. See Catlin v. United States, 65 S. Ct. 631; United States v. 17,280 Acres of Land, etc., D. C., 47 F. Supp. 267."

To the same effect see:

United States v. Parcel of Land, 54 F. Supp. 901;

United States v. 150.29 Acres of Land, 47 F. Supp. 371;

United States v. Certain Parcels of Land, 40 F. Supp. 436;

James Alexander Inc. v. United States, 128 F. 2d 82 (Head Note 6);

United States v. 1.87 Acres of Land, C. C. A. 3rd, 155 F. 2d 113.

It is true that in the case at bar there was no declaration of taking but funds were deposited into the Registry of the Court during the period of the occupancy by the United States and after the entry of the Judgment in Condemnation [R. 2, 264 and 265]. Whether the funds were deposited in the Registry of the Court under the declaration

of taking statute, the Second War Powers Act or in payment of the Judgment in Condemnation is not material. As was stated in the recent case of *Oliver v. United States,* C. C. A. 8th, 156 F. 2d 281 at 283:

> "A federal court having acquired possession of a fund in the course of a proceeding within its jurisdiction also has jurisdiction of the conflicting claims to ownership of the fund, regardless of the citizenship of the claimants."

See also *Galvin v. Southern Hotel Corporation* (1947 C. C. A. 4th), 164 F. 2d 791, which approved the same rule where the facts were very similar to the case at bar.

These statutes and decisions are, we respectfully submit, a complete answer to the contentions made by Lebenbaum that the Court lacked jurisdiction to apportion the award.

In the opening brief of appellant Lebenbaum this jurisdiction of the Court is attacked in various manners, first, by contending that since the lower court had held the lease was not cancelled that it was only the interest of the tenant that was condemned relying principally upon the cases of *Pasadena v. Porter,* 201 Cal. 381, 257 Pac. 526; *Gluck v. Baltimore,* 81 Md. 315, 32 Atl. 515; and *Leonard v. Auto Car Sales and Service Co.,* 392 Ill. 182, 64 N. E. 2d 477. It is respectfully submitted that none of these cases are in point.

The case of *Pasadena v. Porter,* which in turn relies primarily upon the decision of *Gluck v. Baltimore,* involved condemnation proceedings where only a portion of leased premises was taken for the opening of a street and the primary question involved was whether or not the tenant

was required to continue to pay the specified rent for the entire premises during the balance of the term and, therefore, entitled to an award for the rental value of the condemned portion, or whether the rental for the balance of the term would be prorated to the remaining area not taken and the landlord be entitled to the entire award for the portion condemned. It must also be remembered that the case of *Pasadena v. Porter* was decided in June, 1927, at which time Section 1246.1 C. C. P. was not in effect. Section 1246.1 C. C. P. was first adopted in 1939. It is respectfully submitted that had Section 1246.1 C. C. P. been in effect at the time of the *Porter* case a different decision might have resulted. See the dissenting opinion in said case.

The case of *Leonard v. Auto Car Sales & Service Co.,* is clearly distinguishable. In that action there was a long term lease with a fixed annual rental. The government took a temporary use of the premises. There was no condemnation clause in the lease. The tenant having failed to pay rent during the government's occupancy the landlord brought suit for the rent and the court held that the tenant was required to pay the flat rent during the period of the government's occupancy and that the condemnation proceeding did not terminate the lease.

Lebenbaum's second contention is based upon the claim that by stipulating to the amount of the just compensation the parties had abandoned the measure of damages fixed by the Fifth Amendment. We respectfully submit that such is not the case and that the authorities cited (*Albrecht*

v. United States, 329 U. S. 599, 91 L. Ed. 532; *Danforth v. United States,* 308 U. S. 271, 84 L. Ed. 240; *Wachovia Bank v. United States,* 98 F. 2d 609) to support the contention are not in point.

The main condemnation action between the United States on the one hand and Gawzners and Lebenbaum on the other hand commenced October 23, 1946 [R. 139] after counsel for the United States elected to require all defendants to litigate their claims jointly [R. 130]. The jury was excused from time to time while arguments were carried on and briefs were being submitted. The parties were likewise carrying on negotiations to settle the amount of compensation to be treated between the defendants (Gawzners and Lebenbaum) as if the sum agreed upon was a verdict of the jury [R. 142].

Ultimately a settlement was made between the United States on the one hand and Gawzners and Lebenbaum on the other hand. This settlement was set forth in a written stipulation [R. 45]. That entire stipulation is based upon the theory expressed therein that the sum of $205,000 was the fair, just, and adequate compensation for the estate condemned and failure to restore the premises [R. 47]. It was stipulated that if competent witnesses were sworn their testimony would be that the sum of $205,000 constituted fair, just and adequate compensation for the taking of the interests condemned and failure to restore the premises [R. 49]. It was also stipulated a judgment should be entered providing for a decree in condemnation incorporating the terms of the stipulation [R. 46]. The

stipulation provided that the Court should retain jurisdiction to distribute the award the same as though a jury had rendered a verdict for said sum of $205,000 [R. 51].

The Court made and entered a judgment and decree in condemnation on the strength of that stipulation [R. 53], which incorporated the provision that jurisdiction was retained to apportion the award [R. 58].

In view of these unquestioned facts that the entire stipulation and judgment were set forth in the direct language of the Fifth Amendment in a proceeding instituted pursuant to that Amendment, we are frank to say we do not see how it can be argued that the parties abandoned the measure of damages fixed by the Fifth Amendment.

This argument has been advanced for the first time in Lebenbaum's opening brief. In view of the fact that the contention is contrary to the stipulations executed by Lebenbaum, we do not believe it merits much consideration. Nor do we see the force of the argument unless counsel are contending that *by agreeing to just compensation* the same as though a verdict had been rendered for the amount they can somehow escape the unquestioned law relating to distribution of an award fixed by a jury or court.

We submit that if such is the purpose of the argument, it is a species of legalistic legerdemain we do not comprehend. To carry such argument to its logical conclusion would penalize parties for settling litigation and reward them for insisting upon a trial. Apparently counsel con-

cede that if a jury had awarded a verdict after trial for the sum of $205,000 as just compensation for the taking and failure to restore, the Court would have retained jurisdiction to apportion the award in accordance with established legal principles, but because the facts were stipulated the Court lost jurisdiction to do that which Lebenbaum stipulated the Court could do.

B. The Contention That the Court Failed to Find Separately the Value of the Use of the Unleased Area Is Not True.

The Court specifically found the value of the unleased area.

Finding 23 [R. 232] provides as follows:

> "That the fair market rental value for the occupancy of the upper portion of said garage during the period beginning July 10, 1944 and ending June 1, 1946, is the sum of $4412.00."

Finding 24 [R. 232] provides as follows:

> "That the fair market rental value for the occupancy of the land not under lease during the period beginning July 10, 1944, and ending June 1, 1946, is the sum of $6088.00."

The two areas described in Findings 23 and 24 were *not* included in the lease [R. 373, 382, 395].

The total of the amounts set forth in Findings 23 and 24 is the sum of $10,500. True the testimony of the witnesses Allen and Frisbie produced by Gawzners fixed the

values of these two areas at $10,950 [R. 382 and 395]. We assume, however, that the Court inadvertently thought the testimony was $10,500 for that figure appears at least twice in the Court's Memorandum of Conclusions [see R. 160 and 162]. Counsel for Lebenbaum conceded this was the fair rental value of such areas [R. 444 and 162].

It would be impossible to more definitely find the fair market rental value of the unleased area. What counsel are really complaining about is that the Court after making such specific findings did not limit the judgment in favor of Gawzners to that amount, or some lesser sum, and award the balance of the funds to Lebenbaum.

C. The Contention Made That the Court Should Have Excluded Gawzners From Participation in the Trial Except as to the Unleased Area Is Moot.

The only motions made to exclude Gawzners from participation in the trial were advanced in the main condemnation action. The Court denied the motions. Both Gawzners and Lebenbaum proceeded to trial against the United States. Thereafter Lebenbaum joined in the stipulation for a judgment in condemnation [R. 45] and by said stipulation consented that the Court should determine the interests of all parties who had appeared in the action (Gawzners and Lebenbaum) in and to the compensation the same as though a jury had rendered a verdict for said sum of $205,000 for the interests taken and for failure to restore. Such stipulation made moot the motions to exclude Gawzners from the main trial.

III.

The District Court Having Jurisdiction of the Parties and the Funds on Deposit in the Registry of the Court Should Have Distributed the Entire Award to Gawzners. Such Distribution Would Have Been in Accordance With Established Principles of Law and the Undisputed Evidence. The Distribution Based on Some Ratio of Fair Market Rental Value for the Property Taken and Prospective Profits of Lessee Was Error.

It is, of course, contended by Gawzners that under Paragraph Ten of the lease (the condemnation clause) all of the award in the case at bar should have been paid to them. *First,* because the clause so provided and, *second,* because the clause required the Court to find the lease had been cancelled by the giving of the Notice of Cancellation by Gawzners and consequently Lebenbaum had no right to share in the condemnation award. A decision on either of these points would have disposed of the problems of this case.

However, if we assume that the condemnation clause does not apply in the instant case, *we contend that the Court should have distributed the entire remaining fund to Gawzners.*

On more than one occasion in Lebenbaum's opening brief it is stated that Gawzners refused to accept rent while the United States was in possession or otherwise the rent would have been paid. It is true the Court so found [Finding 13, R. 226]. We respectfully contend there is no evidence in the record of such a fact or evidence to support such a finding.

The fact is that Lebenbaum never tendered any rent until after possession was returned to him by the United

States at the expiration of the taking. That tender was for the subsequent period of operation of the hotel.

The evidence is that Gawzners were paid no rent while the Government was in possession [R. 422 and 423—Finding 13, R. 226].

In fact Lebenbaum was very careful to contend throughout the trial that he was entitled to the full award, except for the unleased area; that the Court had no jurisdiction to fix rent between the parties; and that the parties were relegated to some other forum to have the rent payable by Lebenbaum determined. Lebenbaum never tendered any rent for the simple reason that there was no basis in the lease upon which to determine the rent due. If the lease was not in fact cancelled, the rent payable to Gawzners for the period the United States was in possession *must have been the reasonable rental value of the premises.* That was the very matter which was in dispute with the United States in the main condemnation case.

We respectfully submit that where the tenant has paid no rent and both the landlord and tenant are before the Court it is the plain duty of the Court to determine the rights of both parties and distribute the award accordingly. *That is unquestionably the law as has been pointed out under Part II of this brief and the opening brief filed on behalf of appellants Gawzner.*

Counsel for Lebenbaum have tacitly so admitted in their opening brief. *They contend the Court should not have attempted an equitable distribution based on the reasonable rental value of the premises and the prospective profits of the lessee.*

The uniform rule established by the Courts requires the distribution of the award to Gawzners, the lessors, where

the undisputed evidence shows Lebenbaum, the lessee, had paid no rent during the period the United States was in possession and that his lease had no bonus value.

United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729;

John Hancock Mutual Life Insurance Company v. United States (1946 C. C. A. 1st), 155 F. 2d 977;

Galvin v. Southern Hotel Corporation (1947 C. C. A. 4th), 164 F. 2d 791.

This contention is treated in detail in the opening brief filed on behalf of appellants Gawzner and we respectfully refer the Court to that brief for a more comprehensive statement of the matter.

Contrary to the contention of Lebenbaum (Lebenbaum Brief p. 56) the "bonus value" theory is adopted by the Courts in *all* cases except where the tenant has *actually* paid the rent called for by the lease to the landlord during the period of taking. A careful examination of the cases cited by Lebenbaum will so disclose.

United States v. General Motors Corp., 323 U. S. 373, 382, 89 L. Ed. 311, 320;

United States v. Petty Motor Co., 327 U. S. 372, 378, 381, 90 L. Ed. 729, 734, 736;

John Hancock Mut. Life Ins. Co. v. United States, 155 F. 2d 977, 978.

See also:

Galvin v. Southern Hotel Corporation (1947 C. C. A. 4th), 164 F. 2d 791.

Of course, if the tenant has paid his rent under the lease during the entire period of taking he would be entitled to the entire award. Here the tenant has paid no rent yet claims the entire award.

Conclusion.

We respectfully submit that the contentions made by appellant Lebenbaum are neither sound in law nor just in equity, and that he has not established a single compensable right which has been taken from him, nor has he established one cent of compensable damage. The only evidence in the case indicates he might have suffered a loss of prospective profits. Yet he seeks to have this Honorable Court distribute to him either the whole award or a handsome profit at the expense of the owner (Gawzners) whose property was actually used by the United States.

We again respectfully contend that the record before this Court is sufficiently complete that the cause should be remanded to the District Court with instructions to enter judgment for Paul Gawzner and Irene Gawzner directing that the balance of the funds in the Registry of the Court should be distributed to them and decreeing that the lease be cancelled and that Lebenbaum is entitled to no portion of the award and directing him to deliver up possession of the premises.

Respectfully submitted,

HILL, MORGAN & FARRER and
STANLEY S. BURRILL,

By: STANLEY S. BURRILL,

Attorneys for Cross-Appellees Paul Gawzner and Irene Gawzner.